BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	§	
	§	
Petition for Declaratory Ruling	§	WC Docket No. 05-283
Regarding Self-Certification of IP	§	
Originated VoIP Traffic	§	

REPLY COMMENTS OF GRANDE COMMUNICATIONS NETWORKS, INC.

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SUMMARY

The Comments filed in response to Grande's Petition for Declaratory Ruling reveal a sharp divide between ILEC and non-ILEC interests and the need for prompt Commission action. This heated debate is what prompted Grande to file its Petition. Grande looks for a ruling, effective until the Commission comprehensively addresses intercarrier compensation and related issues in its *IP-Enabled Services* and *Intercarrier Compensation* rulemakings, that will help it and other intermediate LECs to navigate the troubled waters between terminating LECs actively seeking to collect access charges on VoIP-originated traffic and self-certifying enhanced service providers that access the local exchange market through Grande.

Grande does not seek to change the current law. The Commission's regulations and existing precedent make clear that traffic which undergoes a net protocol conversion is exempt from both originating *and terminating* interstate access charges. The comments of the ILECs makes clear that they would like the Commission to reach conclusions *now* on issues surrounding VoIP-originated traffic that are under consideration to be changed going forward. But in this matter, the Commission must interpret and apply the enhanced service provider access charge exemption as it exists today. Indeed, AT&T urges the Commission to apply interstate access charges to IP-PSTN, of which the VoIP-originated traffic is a variety, *as a transitional measure* and *on a prospective basis.* Putting aside whether that is the correct thing to do in one of the pending rulemakings – that ruling cannot occur in the context of this declaratory ruling proceeding – AT&T's comment underscores the current state of the law.

The relief Grande seeks is predicated on the good faith of consumers of telecommunications services. The ILEC commenters offer no persuasive evidence that the grant of the Petition will open the flood gates to fraudulent activity or make intermediate LECs

receiving such certifications any less surveillant than they are required to be today. The customers in Grande's certification scenario are making a clear statement that the traffic is VoIP-originated (*i.e.,* undergoes a net protocol conversion where it is terminated on the PSTN), that it is enhanced, and that they are in compliance with all applicable law and regulations. Furthermore, as stated in the Petition, an intermediate LEC cannot rely on a customer's certification and treat Certified Traffic as local if it has knowledge to conclude that the traffic is not enhanced.

Significantly, the Petition does not seek an unrebuttable presumption that Certified Traffic is entitled to the access charge exemption. A terminating LEC may challenge the accuracy of the certification and seek to collect access charges in appropriate circumstances. In such cases, the Commission should make clear that the terminating LEC has the burden to prove that the traffic is subject to access charges, and that such charges can be assessed, consistent with lawful tariffs or contracts, against every specific entity from whom the terminating LEC seeks to collect the charges. In the final analysis, therefore, grant of the Grande Petition would not deprive terminating LECs of any access charges to which they are due.

Arguments that the certification, as presented in the Petition, is not adequate or is somehow inconsistent with the description of the Certified Traffic in Grande's Petition are not justified. The reasonable reading of the representative certification reveals that the Certified Traffic originates in VoIP-format at the end user premises and undergoes a net protocol conversion and that the certification would not allow IP-in-the-middle traffic such as was subject to the 2004 *AT&T Declaratory Ruling* to be included.

The Commission should grant Grande's Petition expeditiously.

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Grande Communications Networks, Inc. (hereafter "Grande"),[1] by its attorneys, hereby submits its replies to the initial comments filed in this docket, pursuant to the schedule set forth in the Public Notice.[2]

INTRODUCTION

Taken as a whole, the comments filed in connection with Grande's Petition reveal the need for expeditious Federal Communications Commission ("Commission" or "FCC") action. Whether commenters support or oppose the Petition, the intensity of the controversy is unmistakable. The sharply divided record that has been created makes clear the need for prompt Commission guidance.

Much, if not most, of the passion in the incumbent local exchange carrier ("ILEC") opposition to Grande's Petition appears to stem from the asserted but largely unquantified and unsubstantiated claims, oft repeated, that granting Grande's Petition would lead to significant

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1 Effective January 1, 2006, Grande Communications, Inc. was merged into Grande Communications Networks, Inc., the surviving corporate entity.

2 *Pleading Cycle Established for Grande Communications' Petition for Declaratory Ruling Regarding Intercarrier Compensation for IP-Originated Calls*, DA 05-2680, WC Docket No. 05-283 (rel. Oct. 12, 2005).

loss of ILEC revenue,[3] uneconomic by-pass[4] and threaten Universal Service.[5] Actually, of course, Grande's Petition has no impact on these matters because the substantive law will not be altered by granting this Petition. These complaints are the same policy arguments made by the ILECs routinely as reasons to change the telecommunications law and regulations to subject IP-enabled services to access charges and Title II regulation. The Commission is evaluating those arguments in appropriate rulemaking proceedings.[6] Granting this Petition would not prejudge the outcome of those proceedings.

Grande filed its Petition in this docket seeking guidance to navigate the controversies between terminating local exchange carriers[7] ("LECs") seeking access charges on certain types of IP-enabled traffic, and the entities from which the terminating LECs seek to collect the access charges, the local exchange carriers ("LECs"), who provide intermediate transport and switching in the terminating local market, such as Grande. While the Commission has issues affecting the *future* treatment of this traffic under consideration as part of comprehensive rulemakings, the Grande Petition seeks a narrow ruling to bring increased stability *now* in a specific segment of the national communications market without altering the *status quo* as to the legal character of the traffic at issue.

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3 *See, e.g.*, Comments of Cincinnati Bell at 5; ITTA, *et. al.* at 7.

4 *See, e.g.*, CenturyTel at 8.

5 *See, e.g.*, ITTA *et. al.* at 7.

6 *See IP-Enabled Services*, 19 FCC Rcd 4863 (2004)("IP-Enabled Services"); and *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610 (2001)("Inter-carrier Compensation").

7 Typically, terminating LECs seeking to collect access charges on IP-enabled services have been incumbent local exchange carriers.

At its core, Grande seeks a declaration that where a LEC obtains from a customer a certification that certain traffic delivered by that customer to that LEC originates at an end-user's premise in Voice over Internet Protocol ("VoIP") (the "Certified Traffic"), that LEC is entitled to rely on that certificate absent knowledge the certificate is incorrect. Specifically, Grande seeks confirmation that such a LEC may offer local services to the customer for the Certified Traffic and, when the Certified Traffic is destined for an end-user of another LEC, may send the Certified Traffic to the other LEC over local interconnection trunks unless and until the Commission decides otherwise in another proceeding, including either the *IP-Enabled Services Rulemaking* or the *Intercarrier Compensation Rulemaking.* Likewise, the other LEC may not assess access charges on Certified Traffic unless or until the Commission decides otherwise in some other proceeding including either the *IP-Enabled Services Rulemaking* or the *Intercarrier Compensation Rulemaking.*[8]

Grande has proposed what it believes to be a practical and administratively efficient mechanism. This mechanism provides the ILECs something they do not have today, namely an affirmative representation that certain traffic meets certain criteria and thus, qualifies as enhanced traffic. If, as the ILECs predict, companies make false certifications, and the ILECs actually develop objective evidence of the misrepresentation, the false certification may indeed serve as a valuable piece of evidence for the ILECs' action against the party making the

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[8] As discussed further below, Grande, by filing its Petition, does not mean to foreclose a terminating LEC from contending and proving that the Certified Traffic, despite the certification, was actually subject to access charges and that the terminating LEC was entitled to recover access charges for terminating that traffic. Moreover, Verizon's arguments that Grande's Petition is at odds with Commission's statements that all traffic should be treated on the same footing is misplaced. *See* Comments of Verizon at 2. The Commission's pending rulemakings in its *IP-Enabled Services* and *Intercarrier Compensation* proceedings have been established to determine to what extent and how to implement such principles prospectively to change the *status quo*.

misrepresentation. Grande's requested ruling would also further the public policy goal of aligning responsibility with the appropriate party if a misrepresentation is made.

In other words, the certificate would create a rebuttable presumption that, under the enhanced services exemption, the customer of the intermediate LEC is entitled to purchase local services to deliver the traffic to the terminating LEC and that the traffic is entitled to be treated as local in all respects. The presumption may be rebutted, for example, by objective evidence that the traffic did not originate as VoIP traffic at an end-user's premise.[9] At that point, however, recourse for access charges, if any, would be dictated by the tariff and or contracts of the party seeking to collect access charges, but only to the extent applicable to the carriers involved in originating and routing the traffic before it is received by the terminating LEC. Under the FCC's current rules, there would be no recourse for unpaid interstate access charges against the intermediate LEC that relied upon the certificate in delivering the traffic over local interconnection trunks and otherwise treated that traffic as local.[10]

Even a quick review of the comments filed in response to Grande's Petition leads to the inescapable conclusion that prompt Commission action is needed to address a real and immediate controversy. The divide between the ILEC community and the non-ILEC commenters could not be sharper on the question of how an intermediate LEC is entitled to treat traffic which has been certified as having originated as VoIP traffic at an end user's premise.

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9 Accordingly, Grande does not, as Qwest suggests, seek a ruling that forecloses questioning the truth of the certification. *See* Comments of Qwest at 5. The issue is the LEC's ability to rely upon the certification in complying with the Commission's access charge exemption absent knowledge the certification is untrue.

10 Liability against that LEC, if any, would have to be established on a different basis. Other issues might arise, possibly under an interconnection agreement, if the evidence showed that the LEC relying on the certificate had actual knowledge that the certificate was false when the traffic was delivered.

The visceral reactions and unwarranted assumptions by many, though not all, of the ILEC community commenters underscores the importance of a practical solution without delay.

DISCUSSION

I. Grande Does Not Seek a Determination of the Legal Status of VoIP Traffic in Its Petition, Nor is One Required.

As set out in its Petition, the question of the current legal status of VoIP-originated traffic that terminates on the public switched network is settled. Access charges do not apply to such traffic.[11] Grande bases that conclusion on its reading of Commission regulations and orders and judicial decisions which have held that traffic which undergoes net protocol conversion (*e.g.*, Internet protocol to time division multiplex, on an end-to-end basis) is "enhanced traffic," and that all "enhanced traffic" should be exempt from both originating and terminating access charges.[12] This treatment under current law and regulation is underscored by the fact that one of the ILECs that has been the most aggressive in seeking access charges for certain IP-enabled services, SBC, now part of the post-merger AT&T, advocates for a *prospective* determination that traffic that undergoes a net protocol conversion from IP to TDM should be subject to access charges.[13]

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11 *See* Grande Petition at 7-14.

12 *See, e.g.*, 47 C.F.R. 64.702(a) (traffic that undergoes protocol conversion is enhanced and does not fall under Title II); *Vonage v. Minnesota PUC*, 290 F. Supp. 2d 993, 999 (D. Minn.), *aff'd*, 394 F. 3d 568 (8th Cir. 2004) (VoIP-originated traffic that terminates on PSTN undergoes net protocol conversion and is enhanced under Section 64.702 of Commission's rules); *Access Charge Reform*, 12 FCC Rcd 15982, 16131-16135 (1997) (exemption applies to originating and terminating traffic), *aff'd Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998).

13 Comments of AT&T at 2.

Although the Commission has observed on more than one occasion, including decisions reaffirming the enhanced services access charge exemption,[14] that in the future it may reconsider the decision to exempt some or all enhanced traffic, the Commission has not yet done so. The two narrow instances involving the pre-merger AT&T and a third involving a computer-computer application of pulver.com do not narrow the exemption or articulate it in a way to exclude the Certified Traffic. None of these cases involve VoIP-traffic originated at the end-user premise.[15] Moreover, at the very least, the record developed in response to the Petition underscores the need for a ruling that, where there is a heated debate between a terminating LEC and an upstream service provider whether that particular service provider's traffic is enhanced, intermediate LECs should be entitled to rely upon the representations of their customers that their traffic is enhanced in determining whether the customer is entitled to purchase local services.

Opposing commenters' reliance on earlier decisions of the courts and this Commission to argue that VoIP traffic is subject to access charges is misplaced. For example, the opinion of the Eighth Circuit Court of Appeals in *SBC v. FCC*[16] supports Grande's understanding that enhanced services and enhanced service providers are not subject to access charges and had not been for the fourteen years prior to the Court's opinion:

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14 *See, e.g., Access Charge Reform*, 12 FCC Rcd ¶¶ 341-348.

15 *Petition for Declaratory Ruling that AT&T's IP Telephony Services Are Exempt From Access Charges*, 19 FCC Rcd 7457 (2004) ("AT&T Declaratory Ruling"); *AT&T Corporation Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd 4826 (2005); *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307 (2004).

16 *Southwestern Bell, supra,* 153 F. 3d 523.

> Initially we note that the FCC has maintained the same position for the past fourteen years, refusing to permit the assessment of interstate access charges on ISPs. *See In Re Amendments of Part 69 of the Commission's Rules Relating to the Creation of Subelements for Open Network Architecture; Policy and Rules Concerning Rates for Dominant Carriers,* Report and Order (CC Docket Nos. 89-79,87-313), FCC 91-186, 6 FCC Rcd No. 15 4524 ¶ 60 (released July 11, 1991)(noting that access system in which ISPs do not pay per- minute charges is the *"status quo").*[17]

The Court also notes that the Commission was continuing to evaluate a number of considerations with regard to whether access charges should be assessed on ESPs under certain circumstances. "To the extent the Bell South petitioners and the Bell Atlantic parties complain about the ISPs uncompensated burden on their local networks, they, as well as other LECs, are welcome to address their continued concerns to the FCC through the NOI process."[18] In the end, however, the Eighth Circuit upheld the exemption, without modification or qualification, which the Commission had affirmed in its 1997 *Access Charge Reform* proceeding as applying to terminating, and not just originating, traffic.

The Commission has posited in the *IP-Enabled Services Rulemaking* that, as a policy matter, perhaps the ESP exemption law should be modified or even eliminated, but this should not affect the ruling Grande seeks in the Petition.[19] The ILEC commenters, of course, make much of the Commission's prospective policy statements, anxious to apply them now as though they were current statements of the law, but in citing that language they do not include the

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17 *Id.* at 541-542.

18 *Id.* at 543. The Bell South petitioners and Bell Atlantic parties are identified by the Court at 535, n.2.

19 *In the Matter of IP-Enabled Services*, 19 FCC Rcd 4863, 4885 ¶ 33 (2004).

preceding sentence in which the Commission was careful to say explicitly that its policy discussions should not be understood to alter the current law:

> We note, however, that by seeking comment on whether access charges should apply to the various categories of service identified by the commenters, *we are not addressing whether access charges apply or do not apply under existing law.*
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> 33. As a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways. [20]

The essential point, however, is that the Commission continues its assessment to date, and the exemption as affirmed by the Eighth Circuit has not yet changed. That is the real problem for the ILEC commenters. That is why the opposition comments do not point to a decision of the Commission or a court specifically applying access charges to the type of traffic that would be subject to the proposed certification process, and why the largest ILEC in the country, the post-merger AT&T, seeks a prospective ruling that access charges apply to IP-PSTN traffic, which would encompass the Certified Traffic.

This is not to say that the concerns raised by the ILEC community regarding alleged uneconomic by-pass and purported revenue impacts do not deserve consideration in the right forum. But none of that is relevant to the ruling that Grande seeks in the context of the current environment.

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[20] *Id.* (emphasis added).

II. Grande Proposes a Limited Procedure to Facilitate Day-to-Day Business Pending Commission Action in the *Inter-carrier Compensation* and *IP-Enabled Services Rulemakings*.

Grande's request for a declaration that a LEC is entitled to rely upon a customer's certification as to the nature of traffic delivered to the LEC has received general support from non-ILEC commenters. ILECs and various ILEC associations raise objections, the most significant of which are addressed below.

1. The Certification Process Is Not Susceptible to Misuse Without Recourse by Affected ILECs.

Several ILECs and ILEC associations oppose the Grande Petition because they assert that a grant by the Commission will result in an epidemic of fraudulent certifications with dramatically adverse impacts.[21] As a corollary, some LECs assert that a CLEC would have no incentive to discourage false certifications.[22] There is no reason to fear a rash of false certifications. The ILECs' fear betrays a presumption that market participants will act unlawfully. They also assert, without foundation, that CLECs receiving such certifications will be active participants in schemes to defraud ILECs.[23] Of course, these ILECs also have historically assumed the active participation of CLECs in any situation where they suspect that an upstream carrier or provider is seeking to evade the imposition of access charges. In short, the certification process is inappropriate, these commenters suggest, because it will be misused, and terminating ILECs will be harmed without recourse if the Petition is granted.

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21 *See, e.g.*, Opposing Comments of Bell South at 13; CenturyTel at 3 and 8; USTA at ii (alleging certification would be "a scheme to launder interLATA traffic and deprive other LECs of lawful compensation") and 8; ITTA, et al at 5-6).

22 *See, e.g.*, Comments of Cincinnati Bell at 4.

23 *See, e.g.*, Comments of Texas Statewide Telephone Cooperative, Inc. ("TSTCI") at 1.

Regulatory agencies' actions, and the courts' review of those actions, assume compliance by affected parties with regulatory requirements with recourse for refusals or failures to comply.[24] Any customer, for example, that orders service from a local business tariff is essentially making a representation that they are eligible for the services. Grant of the Grande Petition would not create any additional incentives to any that exist now.

Rather than open the "flood gates" to fraud, the relief Grande is requesting would allow ILECs to better discharge their duty as carriers consistent with their common carrier obligations. One group of commenters supporting the Petition urges that the recalcitrance of the ILECs on the issue of whether access charges apply to IP-enabled services poses an extremely burdensome hurdle on intermediate LECs that also hinders technological innovation.[25] As Level 3 and Broadwing note, intermediate LECs should not have to prove endlessly that they are not co-conspirators whenever an ILEC accuses an upstream provider of seeking to evade access charges.[26] Another supporter suggests that certifications more broadly stated should be allowed as well.[27] Other market participant commenters support the Petition as recognizing a "practical and reasonable" solution.[28] In other words, these commenters support the result Grande seeks on

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24 *See National Petroleum Refiners Ass'n., et al v. Federal Trade Commission, et al,* 482 F. 2d 672, 685 (D.C. Cir. 1973).

25 Comments of Broadwing and Level 3 at iv, 15.

26 *Id.* at 3-8.

27 Comments of UTEX at 8. Grande, by filing its Petition, did not mean to set an outer limit to the types of services that are subject to the access charge exemption or that may be the focus of certifications by customers that their traffic is exempt from access charges and on which LECs, in good faith, may rely in order to determine whether that customer is entitled to purchase local service and have its traffic treated as local rather than interexchange. The Petition does not seek to change through the certification the status quo as to what is or is not local traffic.

28 *See, e.g.*, Comments of Earthlink at 3.

the assumption that, as a general matter, upstream providers act in good faith to comply with the law when purchasing services form common carriers.

Significantly, if there are some false certifications, as explained in the next section, terminating LECs would not be foreclosed from seeking to collect access charges they believe are due. This highlights that the focus of the relief requested is an intermediate LEC's ability to rely on a certification, not that the certification would constitute some unassailable truth that the traffic is enhanced, as Qwest suggests.[29]

Grant of the Petition would not allow an intermediate LEC to blithely accept, without recourse, a certification the LEC has reason to conclude is false. Receipt of a certification would not change, for example, a carrier's ordering and provisioning processes for local business services. Grande's proposal would specifically preclude an intermediate LEC from delivering Certified Traffic to an ILEC or other terminating LEC as local if the intermediate LEC had knowledge to conclude that the certification from its customer was false. However, the ruling Grande seeks would allow the intermediate LEC to rely *only* upon certificates when it has no knowledge to conclude the certification is false. Absent such knowledge, no grounds exist for attempting to link an intermediate LEC in Grande's position to a party that has wrongfully used local services in an attempt to evade access charges.

2. Grant of Grande's Petition Would Not Deny LECs Remedy For False Certification.

Related to the unfounded argument that fraud would increase if the Petition is granted is the ILEC objection that the result Grande seeks would preclude an ILEC challenge to a

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29 *See note* 9, *supra.*

certification.[30] These comments misconstrue Grande's proposal. Nothing in Grande's proposal precludes or is intended to preclude an ILEC from pursuing redress upon discovery, for example, of an act of fraud or intentional misrepresentation by the customer making the certification. However, what Grande's proposal would require is, first, such redress be directed at the party engaged in the misrepresentation and not other parties in the call stream as to whom there is no evidence of wrongdoing; second, the Commission should make clear that any party challenging the validity of a certificate has the burden of proof that the certification is invalid; and, third, that any effort to collect access charges must, as always, be supported by valid contract or tariff provisions, as well as Commission precedent and regulation, that would allow the terminating LEC to collect the access charges it seeks. The ILEC objections to the proposed process seem to stem from a desire to not be subject to requirements such as these, and nothing more.

3. Terminating Traffic Can Be Subject to the Enhanced Services Exemption.

Some ILEC commenters argue that the ESP exemption from access charges only applies when an ESP customer calls an ESP, *i.e.*, only applies to originating access charges.[31] They do not point to a precise statement by the Commission to that effect. The Commission has explicitly stated the exemption applies to both originating and terminating access charges.[32] Earthlink observes that the 2004 *AT&T Declaratory Ruling* would not have been decided as it was (on the basis that IP-in-the-middle is a telecom service) if the ESP exemption did not apply to

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30 Global Crossing, though generally supportive of the proposed process, apparently also understood Grande to propose a preclusive certification. Comments of Global Crossing at 8. As explained here, that is not Grande's intent. Grande does believe, however, that the Commission should require objective evidence to challenge the certificate.

31 *See, e.g.*, Comments of Century Tel at 3; USTA at 11.

32. *Access Charge Reform*, 12 FCC Rcd 15982, 16131-16132.

terminating access charges.[33] AT&T made terminating access charges alone the subject of that case. If the exemption did not apply to terminating access charges, that would be all the Commission need have said, regardless of whether the service in question was telecommunications or enhanced. The Commission's discussion of whether the service in question was a telecommunications service would have been completely irrelevant if the exemption applied only to originating access charges.

4. Traffic Is *Not* Subject to Access Charges Based Solely Upon the Call Identification Data.

Several ILEC and ILEC associations suggest that the certification would permit "Grande to classify its traffic as local," improperly changing the jurisdiction of the call.[34] As an initial matter, none of the traffic that is the subject of the Petition is "Grande's traffic," in the sense that Grande does not claim to be an enhanced service provider.[35] The Petition did not leave this issue in doubt, although some opponents in their zeal to collect access charges automatically associate an intermediate LEC with any perceived effort to avoid access charges by an upstream provider.

Because some VoIP originated traffic includes, without alteration, call identification data (CPN/ANI) associated with the originating end user, ILECs argue that where the call identification data "conclusively establishes" that the traffic originated in a different exchange from where it is being terminated – where traffic is VoIP-originated, the customer may be itinerant provided it has a broadband connection, although the calling party number will not

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33 *See* Comments of Earthlink at 8.

34 *See, e.g.*, Comments of TSTCI at 2.

35 Contrary to the assumptions of other commenters, Grande does not perform the protocol conversion. This has already occurred upstream. *See* Comments of TSTCI at 3 (apparently misunderstanding that the Certified Traffic is sent to Grande in IP format, and that Grande performs the conversion).

change – and that the traffic is traditional Title II inter-state or intra-state inter-exchange telephone calls, subject to terminating access charges.[36] However, these arguments run roughshod over the existence of the exemption, which assumes that, but for the exemption itself, the traffic subject to the exemption would be considered inter-exchange traffic. In the absence of a national identification convention for VoIP originated calls, inclusion of conventional call data can make VoIP originated calls appear similar to traditional end-to-end circuit switched calls. Therefore, it is no surprise when Certified Traffic bears certain marks of interexchange traffic, such as CPN or ANI revealing that the traffic appeared to originate from a remote location. In and of itself, the presence of CPN or ANI that suggests origin from a remote exchange is not evidence that the traffic is *not* enhanced.[37] One of the points of Grande's Petition is that, where a certification that traffic is VoIP-originated is received in good faith, the presence of call origination data which indicates the originating end user is located in a distant exchange is not a basis for an intermediate LEC to deny the customer local services.[38] Further, the access charge exemption presumes, in effect, that the traffic may originate from a different exchange than where it terminates.

5. The Certificate Discussed in the Petition is Not Deficient.

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36 *See, e.g.*, Comments of TSTCI at 2; ITTA at 5; Cincinnati Bell at 4; Bell South at 5; USTA at 11.

37 As UTEX notes, CPN is not necessarily relevant in an IP world. Comments of UTEX at 17. IP-enabled services, in essence, have to fool the network in order to terminate on the PSTN, such that a VoIP-originated communication will look to the terminating network switches like a regular call. *Id.* at 9-10.

38 Cincinnati Bell argues that CLECs are obligated to ascertain the jurisdiction of traffic. Comments of Cincinnati Bell at 4. The point of the Petition and the requested relief is to determine that, where a CLEC receives a certification that the traffic is enhanced in good faith, it has indeed done its part to ascertain the jurisdiction of the traffic. Moreover, any terminating LEC that seeks to collect access charges bears the burden of demonstrating that the charges are due, and cannot shift that burden to an intermediate LEC, as Cincinnati Bell seems to suggest.

In contrast to many of the commenting ILECs which rely primarily on generalized predictions of widespread abuse of a certification process, the post-merger AT&T raises specific concerns about the certification process as discussed in the Petition.[39] Grande addresses each concern below.

The certification attached to the Petition as representative states, in pertinent part:

> Customer represents, warrants and agrees that it is in compliance with all applicable laws and regulations, related to the routing and identification of traffic and that the traffic it delivers to Grande for services hereunder shall be enhanced traffic as such is defined in 47 U.S.C. Section 153(20) ("VoIP Traffic") and which originated as VoIP Traffic.[40]

AT&T objects that the certification Grande includes in its Petition does not explicitly require the traffic to originate at the premise of the calling party.[41] Grande believes that is precisely what this certification states. A carrier could certainly decide to make this point even more explicitly. What the certification attached to the Petition also makes clear, and this is the critical point for purposes of the relief sought in the Petition, is that the customer represents that the traffic is enhanced traffic and that the customer is acting in compliance with applicable law. It is on such a representation, when received in good faith, that Grande believes intermediate LECs should be entitled to rely.

AT&T also suggests that a loophole exists in the representative certification to permit it to encompass a carrier using IP-in-the-middle (a la traffic subject to the *AT&T Declaratory*

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39 AT&T simply asks the Commission to rule that access charges will apply on a prospective basis to IP-PSTN traffic. AT&T Comments at 2. As Grande has noted above, that would be a change of the status quo (as, indeed, AT&T's proposition suggests as much), and such a ruling would not be appropriate in this docket which should be limited to the application of current law.

40 Grande Petition, Ex. A.

41 Comments of AT&T at 11-12.

Ruling).[42] Although Grande disagrees that such an interpretation is reasonable, it could be mooted by explicitly specifying calling party premise origination. Further, if the traffic is, indeed, IP-in-the-middle traffic within the scope of the *AT&T Declaratory Ruling*, then the customer cannot validly make the certification as written because the customer could not represent the traffic as enhanced. AT&T also objects that the representative certification does not include an explicit representation that a net protocol conversion occurs.[43] Grande, which terminates traffic it receives pursuant to such a certification in TDM format, believes that the presence of a net protocol conversion is unmistakable on a fair reading of the certification since traffic is certified to originate in VoIP and, because Grande will terminate it or hand it off to other LECs to terminate, is to be delivered TDM on the PSTN. Although net protocol conversion is implicit in the certification as written, Grande would certainly not question any carrier that chooses a form of certification that expressly included the words "net protocol conversion".

AT&T opposes Grande's suggestion that a LEC delivering Certified Traffic must have actual knowledge of a misrepresentation before an ILEC could attempt to assess liability of any kind (other than reciprocal compensation) against that entity. AT&T asserts that the actual knowledge standard would foster "self-interested indolence" on the part of the LEC delivering Certified Traffic to the ILEC's detriment.[44]

No alternative standard is suggested, and, indeed no alternative standard would be appropriate. As discussed above, Grande believes that any party receiving a certification for any

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42 *Id.*

43 *Id.* at 12.

44 Comments of AT&T at 13.

purpose has the obligation to question that certification if the receiving party has knowledge of facts that impeach the accuracy of the certification. Where the ILEC and non-ILEC commenters seem to differ is their starting assumption. Should one begin by assuming a certification is deceitful and false, or should one begin by assuming the certification to be made in good faith and true? The ILEC commenters make it abundantly clear they are in the former camp.[45] Grande and, it would seem, the other non-ILEC commenters are in the latter camp.[46] That does not mean that Grande believes a recipient of a certification is released from an obligation of reasonable inquiry — it does mean there must be a reasonable factual basis to require such an inquiry. The recipient of a certificate must have knowledge of some fact(s) that suggest the certification is incorrect before questioning it. Similarly, Grande supports the Joint CLEC Commenters' discussion of the type of information that should be required from an ILEC challenging the accuracy of the certification.[47] Objective evidence of a misrepresentation that conflicts with the statement that the customer is an enhanced service provider should be a minimal threshold before an intermediate LEC should be required to initiate an inquiry.[48]

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45 *See* Notes 21 and 23 and accompanying text.

46 Grande does not mean that, by filing the Petition, a Commission determination that the mere ordering of local services by an entity that believes it is subject to the enhanced services provider exemption is a certification that the entity is an enhanced services provider. *See* Comments of Global Crossing at 7-8. But that is not the issue raised by the Grande Petition.

47 *See generally* the Comments of the Joint CLEC Commenters (NuVox, XO, and Xspedius).

48 For the reason discussed above, call identification data alone is inadequate to serve as objective evidence that access charges are due. Grande does not ask the Commission to announce here the basis of review if such a case were to be filed. Certainly, some evidence of intentional misrepresentation should be required to justify imposition of access charges on a certifying party.

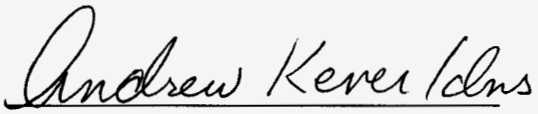
Finally, AT&T suggests that the declaration requested by Grande must be made in a rulemaking because Grande asks the Commission to modify its access charge rules.[49] Grande's request does not require any amendment to any rule. The Commission is empowered to interpret the applicability of its rules, including the appropriateness of the process for obtaining local interconnection for traffic qualified for access charge exemption as Grande requests here, if necessary or appropriate, through the declaratory petition process. [50]

CONCLUSION

For the foregoing reasons, Grande respectfully requests that the Commission grant the relief requested in Grande's Petition.

Respectfully Submitted,

Grande Communications Networks, Inc.



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49 Comments of AT&T at 14.

50 *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 FCC Rcd 7457, ¶2 (2004) (stating that the Commission would use this Declaratory Ruling to clarify the interpretation and application of its rules).

Verification of Andy Sarwal

My full name is Andy Sarwal, and I am over the age of eighteen years old. I am currently General Counsel for Grande Communications Networks, Inc. ("Grande") a corporation organized and existing under the laws of Delaware, with its principal office located at: 401 Carlson Circle, San Marcos, Texas 78666 and on whose behalf I make this verification. I have reviewed the Reply Comments of Grande Communications Networks, Inc. The facts as set forth in the Reply Comments are true and correct, to the best of my knowledge, information, and belief.

I verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on January 11, 2006.

Grande Communications Networks, Inc.

By: _____

Andy Sarwal

CERTIFICATE OF SERVICE

I, Tara Keilberg, hereby certify that on this 11th day of January 2006, copies of the foregoing **"Reply Comments of Grande Communications Networks, Inc."** were: 1) filed with the Federal Communications Commission via its Electronic Comment Filing System; 2) served, via e-mail, on Jennifer McKee, Pricing Policy Division, Wireline Competition Bureau at jennifer.mckee@fcc.gov; and 3) served, via e-mail, on Best Copy and Printing, Inc. at fcc@bcpiweb.com.

Tara Keilberg